Supreme Court, U.S.
FILED

97 1064 DEC 29 1997

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

MARK E. MADDEN,

Petitioner,

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH M. CARPENTER*
CARPENTER, CHARTERED
1525 S. Topeka Blvd.
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

54 pp

QUESTION PRESENTED

A veteran is entitled to Department of Veterans Affairs benefits for any disability incurred while the veteran was in service. A federal statute provides that if certain disabilities manifest themselves within one year after the veteran is discharged from service, those disabilities are presumed to have been incurred in service. The question presented is whether, for the sake of triggering the presumption, a veteran's unrebutted testimony in combination with medical records is sufficient to establish that a disability manifested itself within one year of the veteran's discharge from service.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Alabama Power Co. v. Davis, 431 U.S. 581 (1976)..... 11

Ascherl v. Brown, 4 Vet. App. 371 (1993)..... 12

Brown v. Gardner, 513 U.S. 115 (1994)..... 10

Cartright v. Derwinski, 2 Vet. App. 24 (1991)..... 11

Coffy v. Republic Steel Corp., 447 U.S. 191 (1980) 11

Cuevas v. Principi, 3 Vet. App. 542 (1992)..... 12

Del Vecchio v. Bowers, 296 U.S. 280 (1935)..... 9

Fishgold v. Sullivan Drydock & Repair Corp. et al., 328 U.S. 275 (1946) 10, 11

Grottveit v. Brown, 5 Vet. App. 91 (1993)..... 12

Jensen v. Brown, 19 F.3d 1413 (Fed. Cir. 1994)..... 12

Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960) 10

King v. St. Vincent's Hosp., 502 U.S. 215 (1994)..... 10

Layno v. Brown, 6 Vet. App. 465 (1994) 11, 12

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)..... 9

Rhodes v. Brown, 4 Vet. App. 124 (1993) 12

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)..... 10

Vorris v. Eikel, 346 U.S. 328 (1953)..... 9

Walters v. Nat. Assn. of Radiation Survivors, 473 U.S. 305 (1985)..... 9, 10, 11

Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

38 U.S.C. § 1101 ..... 1, 7

38 U.S.C. § 1110 2

38 U.S.C. § 1112 ..... 2, 3

38 U.S.C. § 1112(a)(1) 7

38 U.S.C. § 1137 ..... 2, 7

38 U.S.C. § 5107(b) 3, 11

38 U.S.C. § 7292 7

38 C.F.R. § 3.102 ..... 3, 11

38 C.F.R. § 3.303(a) 4

38 C.F.R. § 3.303(b) 6

38 C.F.R. § 3.307(a) 5

38 C.F.R. § 3.307(b) 5, 7, 8, 11

38 C.F.R. § 3.309 6

38 C.F.R. § 3.309(a) 5

OTHER AUTHORITIES

"Audit of Appeals Processing Impact on Claims for Veterans' Benefits," Office of Inspector General, Department of Veterans Affairs, Audit Report No. 5D2-B01-013 (Mar. 15, 1995) 12

TABLE OF AUTHORITIES – Continued

Page

Charles L. Cragin, "The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals," 46 Me. L. Rev. 23 (1994) 13

Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, *reprinted in* 1988 U.S.C.C.A.N. 5795..... 7

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 125 F.3d 1477 (Fed. Cir. 1997) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Madden v. Brown* is an unpublished disposition, 1996 WL 465586 (Vet. App., Aug. 12, 1996) (No. 94-1100) and reprinted at App. 2. The underlying Board of Veterans' Appeals decision in the appeal of Mark E. Madden is reprinted at App. 3.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on September 29, 1997.

PROVISIONS INVOLVED

38 U.S.C. § 1101. Definitions

For the purposes of this chapter –

. . .

(3) The term "chronic disease" includes –

. . .

Psychoses

. . .

38 U.S.C. § 1110. Basic entitlement.

For disability resulting from personal injury suffered or disease contracted in the line of duty, . . . the United States will pay to any veteran thus disabled . . . from the period of service in which said injury or disease was incurred. . . . compensation as provided in this subchapter[.]

38 U.S.C. § 1112. Presumptions relating to certain diseases and disabilities.

(a) For the purposes of § 1110 of this Title, . . .

(1) A chronic disease becoming manifest to a degree of 10% or more within one year from the date of separation of such service;

. . . shall be considered to have been incurred in or aggravated by such service, notwithstanding there is no record of evidence of such disease during the period of service.

38 U.S.C. § 1137. Wartime presumptions for certain veterans.

For the purposes of this subchapter and subchapter V of this chapter and notwithstanding the provisions of sections 1132 and

1133 of this subchapter, the provisions of sections 1111, 1112, and 1113 of this chapter shall be applicable in the case of any veteran who served in the active military, naval, or air service after December 31, 1946.

38 U.S.C. § 5107(b). Benefit of the doubt.

When, after consideration of all evidence and material of record in a case before the Department with respect to benefits under laws administered by the Secretary, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. . . .

38 C.F.R. § 3.102. Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not substantially prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or

a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine of the entire, complete record otherwise warrants invoking this doctrine. . . .

38 C.F.R. § 3.303. Principles relating to service connection.

(a) General. Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the armed forces, or if pre-existing such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through application of statutory presumption. . . . Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

(b) Chronicity and continuity. With chronic disease shown as such in service (or within the presumptive period under § 3.307) as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. . . . Continuity of symptomatology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim.

38 C.F.R. § 3.307. Presumptive service connection for chronic, tropical or prisoner-of-war-related disease or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.

(a) General. A chronic . . . disease . . . will be considered to have been incurred in service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in § 3.309(a) will be considered to be chronic.

(b) Evidentiary basis. The factual basis may be established by medical evidence, competent lay evidence, or

both. Medical evidence should set forth the physical findings and symptomatology elicited by examination within the applicable period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion. The chronicity and continuity factors outlined in § 3.303(b) will be considered. . . .

. . . .

38 C.F.R. § 3.309. Disease subject to presumptive service connection.

(a) Chronic diseases. The following diseases shall be granted service connection although not otherwise established as incurred in service if manifested to a compensable degree within the applicable time limits under § 3.307 following service in a period of war . . . , provided the rebuttable presumption provisions of § 3.307 are also satisfied.

. . .

Psychoses

. . .

STATEMENT OF THE CASE

A veteran who suffers from a continuing disability which was incurred during active military duty is entitled to federal disability benefits under laws administered by the Department of Veterans Affairs ("VA"). *See*

38 U.S.C. §§ 1101 *et seq.* If certain diseases manifest themselves within one year following the veteran's discharge from service, those diseases are presumed to have been incurred in service. 38 U.S.C. §§ 1101, 1112(a), 1137. The Secretary of Veterans Affairs ("Secretary") has provided that a veteran may establish that a disease manifested itself within the required time period by "medical evidence, competent lay evidence, or both." 38 C.F.R. § 3.307(b).

A veteran seeking such benefits must file an original claim with a VA Regional Office. If the Regional Office denies his claim, he may appeal to the Board of Veterans' Appeals ("BVA"). Like Regional Office proceedings, BVA proceedings are informal and ex parte in nature. In fact, until 1988, BVA decisions were not subject to judicial review. However, in 1988, Congress created the United States Court of Veterans Appeals ("CVA"), an Article I court with jurisdiction limited to appeals of veterans' benefits claims. *See* Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, *reprinted in* 1988 U.S.C.C.A.N. 5795. The United States Court of Appeals for the Federal Circuit has direct and exclusive appellate jurisdiction to review conclusions of law rendered by the CVA. *See* 38 U.S.C. § 7292.

Mark E. Madden served on active duty in the United States Army from March 1973 until March 1976. Madden later applied for service connection for an acquired psychiatric disorder. Madden's service records do not show any diagnosis of an acquired psychiatric disorder; however, Madden provided a hospital record that stated that he was hospitalized on a VA medical center psychiatric ward in 1976, less than one year after he was discharged

from service. At a hearing in 1990 Madden stated that he had received treatment for a psychiatric disorder during this hospitalization.

Madden also provided notes from 1990 from a doctor at the medical center. The doctor stated that Madden "was here for results of suicidal ideation with depression and anxiety. . . . He was as I remember a patient while on 7 building – he was prescribed with . . . punching bag and running to expend energy that was associated with agitation and anxiety related to depression."

The BVA found that Madden's testimony and the records he supplied were not credible and therefore did not trigger the presumption of service connection, and the CVA agreed that there was not sufficient credible evidence to support Madden's claim. The Federal Circuit ruled that the veteran's own testimony combined with the recollections of the doctor did not constitute sufficient evidence to trigger the presumption under 38 C.F.R. § 3.307(b).

REASONS FOR GRANTING THE WRIT

The Federal Circuit's ruling should be overturned because it conflicts with rulings on similar issues by other circuit courts as well as by the Supreme Court; because it goes against the special nature of veterans' benefits laws; and because it hinders the effective administration of those laws.

Because the Federal Circuit has exclusive jurisdiction over the administration of veterans' benefits laws, there

can be no conflict between federal courts of appeals as to these issues. Nevertheless, the Federal Circuit's ruling in this case contradicts federal rulings in analogous benefits systems that when there is unrebutted evidence offered by a claimant, that evidence cannot be discounted unless there is affirmative evidence to the contrary.

For example, benefits administered under the Longshoremen's and Harbor Workers' Act are, like veterans' benefits, remedial. *See, e.g., Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977); *Vorris v. Eikel*, 346 U.S. 328, 333 (1953). But federal circuit courts of appeals have ruled that under the Longshoremen's Act, "all doubtful fact questions are to be resolved in favor of the injured employee. . . . This policy effectuates the intent of the statute to place 'the burden of possible error' on those best able to bear it." *Young & Co. v. Shea*, 397 F.2d 185, 188 (5th Cir. 1968). In fact, this Court has written in a case regarding the Longshoremen's Act that,

> [c]onsiderations of fairness and experience in human affairs induce fact-finding bodies, where there is a balance of probability, to adopt a working assumption as the basis of a conclusion, unless and until the facts are developed by evidence. . . . The [Longshoremen's Act] . . . announces its own rule, to the effect that *the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption* of accidental death.

Del Vecchio v. Bowers, 296 U.S. 280, 285-86 (1935) (emphasis added).

Social Security benefits are also remedial benefits and thus similar to veterans' benefits. *See, e.g., Walters v. Nat.*

Assn. of Radiation Survivors, 473 U.S. 305, 333 (1985) ("We think that the benefits at stake in VA proceedings, which are not granted on the basis of need, are more akin to . . . Social Security benefits . . . than they are to . . . welfare payments"). It has been held that in Social Security cases, "it does not follow that the court is bound to sustain a denial of disability benefits where the applicant has raised a serious question and the evidence affords no sufficient basis for the Secretary's negative answer." *Kerner v. Flemming*, 283 F.2d 916 (2d Cir. 1960).

Similarly, under the Federal Coal Mine Health and Safety Act of 1969, coal miners who suffer from certain diseases resulting from working in a mine are entitled to benefits. In that legislation, Congress decided that the miner should not have to bear "the burden of the unreliability" of certain kinds of evidence, and this Court subsequently upheld Congress's choice "to resolve doubts in favor of the disabled miner." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 34 (1976).

The holdings in the Longshoremen's Act, Social Security, and Federal Mine Safety Act, all conflict with the Federal Circuit's ruling in this case that the Board of Veterans' Appeals may discount a veteran's testimony even when there is no evidence to the contrary. Such discrepancies are particularly striking given that this Court has repeatedly held that special consideration is to be accorded veterans of the United States Armed Forces. Most recently, the Court stated that when interpreting statutes, "the rule [is] that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-118 (1994). *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221, n. 9 (1994). *See also Fishgold v. Sullivan*

Drydock & Repair Corp. et al., 328 U.S. 275, 285 (1946) (stating that veterans benefits legislation "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 192 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-585 (1976).

In particular, the VA benefits system "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters*, 473 U.S. at 311. Moreover, "the VA is required to read any submission in the light most favorable to the claimant[.]" *Walters*, 473 U.S. at 329; *see* 38 C.F.R. § 3.102. Indeed, the longstanding statute in question – it has existed in one form or another for well over sixty years – demonstrates the nature of the benefits system when it allows the veteran the benefit of a presumption of service connection instead of imposing a weighty evidentiary burden.

Congress has in fact expressed its intent regarding the evidentiary burden on a veteran seeking benefits, stating that when there is "an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt . . . shall be given to the claimant." 38 U.S.C. § 5107(b). Relying on the benefit of the doubt doctrine, the CVA has ruled that the "[a]ppellant's sworn statement . . . unless sufficiently rebutted, may serve to place the evidence in equipoise." *Cartright v. Derwinski*, 2 Vet. App. 24, 25-26 (1991). Such lay testimony is competent to substantiate a claim of service connection for a disability when the layperson is testifying about "symptoms or facts that he observed." *Layno v. Brown*, 6 Vet. App. 465, 469 (1994); *see* 38 C.F.R. § 3.307(b); *see also*

Ascherl v. Brown, 4 Vet. App. 371, 376 (1993); *Rhodes v. Brown*, 4 Vet. App. 124, 126-27 (1993); *Cuevas v. Principi*, 3 Vet. App. 542, 547-48 (1992). The Federal Circuit has gone so far as to state that "[i]f [the government] does not have . . . medical evidence to rebut the proffered testimony of the veteran, it cannot penalize the veteran in favor of whom all doubts are to be resolved." *Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994).

These findings contradict the Federal Circuit's ruling in this case that a veteran's sworn testimony about a fact – the fact of his having received treatment – was not sufficient to trigger the presumption of service connection, even though there was no evidence to rebut the veteran's testimony. The veteran was not testifying as to medical diagnosis or causation. *See Grottveit v. Brown*, 5 Vet. App. 91, 92-93 (1993); *Layno*, 6 Vet. App. at 470. The veteran was instead testifying to the fact of his having received medical treatment. To allow the VA to rebut such evidence by attacking the veteran's credibility, but without presenting any evidence to the contrary, goes against both Congress's specific intent regarding the evidentiary burden to be placed on the veteran and the special nature of the entire veterans' benefits system.

Moreover, a clear, unequivocal ruling by the Court on this matter would simplify and thus help streamline the current veterans' benefits adjudication system, which is notoriously lengthy and unwieldy. Judicial review of BVA decisions is a recent development, and the system is still adjusting to the juxtaposition of the original, nonadversarial procedures and the new legal appeals process. *See, e.g.*, "Audit of Appeals Processing Impact on Claims for

Veterans' Benefits," Office of Inspector General, Department of Veterans Affairs, Audit Report No. 5D2-B01-013 (Mar. 15, 1995). As the then-Chairman of the BVA noted, "Tension inevitably arises between VA's nonadversarial adjudication system and the adversarial arena in which the decisions of that system are reviewed." Charles L. Cragin, "The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals," 46 Me. L. Rev. 23, 30 (1994). Clear guidelines from this Court could help resolve that inevitable tension.

Any resolution, however, should be made with the best interests of the veteran. In the words of Abraham Lincoln, words that are inscribed on the wall of the Department of Veterans' Affairs building, the purpose of veterans' benefits is, quite simply, "to care for him who shall have borne the battle and for his widow and his orphan." Thus the Federal Circuit's decision, which denies benefits to a veteran for no reason more substantial than a doubt about the veteran's credibility, should not be allowed to stand. Instead, the veteran should receive full respect and benefit of the doubt, and his unrebutted testimony should suffice to establish a legal presumption of service connection.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted.

KENNETH M. CARPENTER #08012
CARPENTER, CHARTERED
1525 S.W. Topeka Boulevard
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251
(785) 357-4902 – Fax

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

97-7006

MARK E. MADDEN,

Claimant-Appellant,

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

DECIDED: September 29, 1997

Before PLAGER, CLEVENGER, and BRYSON, *Circuit Judges.*

CLEVENGER, *Circuit Judge.*

Mark E. Madden appeals from the June 17, 1996, decision of the United States Court of Veterans Appeals, which affirmed the decision of the Board of Veterans' Appeals denying on the merits Madden's claim for service connection of an acquired psychiatric disorder. We affirm.

I

Madden served on active duty in the United States Army from March 1973 until March 1976. While in service, Madden was treated on several occasions for a

lower back condition and alcoholism. His subsequent claims for service connection for a low back injury and for liver disease secondary to alcoholism were denied by a Veterans Administration Regional Office in June 1983. Madden did not appeal the denial of those claims to the Board of Veterans' Appeals, and those claims are not the subject matter of Madden's present appeal. The Regional Office in June 1983 also denied Madden's claim for service connection for an acquired psychiatric disorder. Although Madden also did not appeal the denial of that claim directly to the Board of Veterans' Appeals, he later succeeded in reopening that particular claim on the basis that he had presented new and material evidence pertinent to resolution of the claim on its merits.

It is undisputed that Madden's service medical records do not show any diagnosis of an acquired psychiatric disorder incurred during service. Madden's claim may nonetheless succeed if he can demonstrate that his disease became manifest to a degree of ten percent within one year from the date of his separation from service, in Madden's case, by March 15, 1977. The burden is on Madden to prove that his disease thus became manifest, and upon such a showing, the law presumes that the disease is service connected. *See* 38 U.S.C. §§ 1110, 1112(a); 38 C.F.R. §§ 3.303(a), 3.306, 3.307 (1996).

To shoulder his burden at a hearing on April 25, 1990, Madden offered his own lay testimony that his psychiatric condition stemmed from a back injury incurred during service, the pain from which accounted for his alcohol and drug abuse, which fueled his psychiatric difficulties. In particular, Madden asserted that he had been hospitalized at a veterans' facility in Fort Lyon, Colorado, from

October 9 until December 9, 1976, for treatment of his psychiatric disorder.

In addition, Madden produced two medical records to support his claim. The first is notes of Dr. James W. Burrows which summarizes his conversation at an outpatient visit with Madden on April 23, 1990:

> This 36 year old non service-connected male vet was at Fort Lyons 10-9-76 to 12-9-76. He was here for results of suicidal ideation with depression and anxiety and back problems and history of alcohol and drug abuse since he hurt his back in [the] Army – drug history was prolific LSD, quaaludes, marijuana – hash – morphine, speed, etc. – all he says due to back problems? – He was as I remember a patient while on 7 Building – he was prescribed with physical therapy for back – punching bag and running to expend energy that was associated with agitation and anxiety related to depression. He received a regular diet. Medications of Elavil and Valium? he says. I cannot remember myself if Valium was prescribed as it may have been I cannot remember. – He has since lost his records or Leavenworth or Topeka VA has and he [is] concerned with trying to date his hospitalization to prove he was hospitalized within one year of service. I have a strong feeling he may have been my patient he does not remember the name of the social worker or chief of staff.

On the same date as Dr. Burrows's signed notes, he signed a document stating that Madden "[w]as on a Psychiatric Unit for the following hospitalization" from "10/9/76 to 12/9/76," thus confirming the first sentence of his signed outpatient visit report.

II

The question in this case, before the Board of Veterans' Appeals, the Court of Veterans Appeals, and this court, is whether Madden's lay testimony and the two medical records demonstrate that Madden's psychiatric disorder became manifest before March 15, 1977.

Before the Board of Veterans' Appeals, Madden argued that his lay testimony and the medical records established his entitlement to presumed service connection for his psychiatric condition. The Board, in its written decision, recognized the pertinence of Madden's factual assertions, but it held them insufficient to carry Madden's burden. In particular, the Board noted that Madden's lay testimony, now asserting that he had sought and received hospital care for a psychiatric condition in the autumn of 1976, is inconsistent with his previous assertions that, as of then, his maladies were related only to his back and his alcoholism. Further, the Board found highly probative a letter Madden sent to the St. Paul, Minnesota, Regional Office, which Madden wrote while hospitalized in Fort Lyon, in which he stated that his Fort Lyon hospitalization was for "alcohol abuse" treatment. Because the only evidence that was contemporaneous with the 1976 hospitalization described it as related to alcohol treatment, the Board was unpersuaded that Madden's assertions in 1990 that the hospitalization was for psychiatric treatment were true. The Board also discounted to legal insignificance the medical evidence, on the ground that the evidence at most suggested the possibility that Madden had been treated in 1976 for a psychiatric disorder. The Board found that the doctor's recollection was admittedly hazy and incomplete, and

that the details in the doctor's report that were favorable to Madden had been supplied by Madden to the doctor. Given Madden's own characterization of the nature of the 1976 hospitalization and the undisputed fact that no other medical record reference to psychiatric disorder occurs until 1982, which was well beyond the presumptive service connection time period, the Board found as a matter of fact that Madden had failed to prove entitlement to a presumptive service connection.

The Court of Veterans Appeals recounted the evidence that the Board of Veterans' Appeals considered, and interpreted the Board's decision as having found a lack of credible evidence to support Madden's claim. In particular, the Court of Veterans Appeals noted that, in connection with Madden's appeal, the duty of the Board was to "evaluate the merits of the veteran's claim in the light of *all* the evidence, both new and old," quoting *Masors v. Derwinski*, 2 Vet. App. 181, 185 (1992), and "account for the evidence which it finds to be persuasive or unpersuasive," providing reasons or bases for rejecting evidence submitted by or on behalf of the claimant, quoting *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1991). The Court of Veterans Appeals held that the Board had properly discharged its duties: because the current lay testimony conflicts with contemporaneous evidence, and because the medical evidence is vague as to symptoms observed during treatment and even ambiguous as to whether the doctor performed the treatment, the Court of Veterans Appeals agreed that Madden's proofs were not credible.

The Court of Veterans Appeals also rejected Madden's alternative argument that he deserved further factual investigation of his claim under 38 C.F.R. § 3.307(c), which provides:

> Cases in which a chronic condition is shown to exist within a short time following the applicable presumptive period, but without evidence of manifestations within the period, should be developed to determine whether there was symptomatology which in retrospect may be identified and evaluated as manifestation of the chronic disease to the required 10-percent degree.

Madden was held unentitled to further case development under this regulation because his earliest proven indication of a psychiatric condition was in 1982, more than five years after the close of the presumptive time period.

III

Whether we have jurisdiction to hear Madden's appeal depends on how we characterize his challenge to the decision of the Court of Veterans Appeals affirming the decision of the Board of Veterans' Appeals.

It is beyond cavil that we may not review cases from the Court of Veterans Appeals that only challenge the application of law or regulation to specific facts. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991). Instead, Congress has provided that our authority to review the decisions of the Court of Veterans Appeals is restricted to entertaining appeals that seek review of the validity of any statute or regulation, or any interpretations thereof, or that raise constitutional controversies. *See* 38 U.S.C.

§ 7292(a), (d)(2); *Albun v. Brown*, 9 F.3d 1528, 1529-30 (Fed. Cir. 1993) (dismissal for want of jurisdiction required if appeal does not raise a constitutional question, or a question of interpretation of a constitutional or statutory provision or of the interpretation or validity of a regulation); *Livingston v. Derwinski*, 959 F.2d 224, 225 (Fed. Cir. 1992).

The government contends that we lack jurisdiction to hear Madden's appeal because he seeks no more than to argue that the facts he has asserted satisfy his burden to earn a presumption of service connection for his psychiatric disorder. Were there no more to Madden's appeal, we would agree with the government and dismiss this appeal for lack of jurisdiction.

Madden however proposes an interpretation of the governing law under which his appeal would succeed, were we to agree with his interpretation of the law. He thus characterizes his appeal as raising a question of the interpretation of relevant law, a matter fixedly within our jurisdiction. Because we agree with Madden's characterization of the dispositive issue in this appeal, we have jurisdiction to proceed. To the interpretative issue we thus turn.

IV

Madden agrees that he shoulders the burden of proving entitlement to a presumptive service connection under 38 U.S.C. §§ 1110, 1112(a). He notes that under 38 C.F.R. § 3.307(b), he may satisfy his evidentiary obligation by "medical evidence, competent lay evidence, or both," and that "[m]edical evidence should set forth the physical

findings and symptomatology elicited by examination within the applicable period."

Madden's boldest interpretation of section 3.307 is that *any* evidence submitted by the veteran showing manifestation of the claimed disability within the prescribed time is sufficient to gain the presumption of service connection. As long as the veteran proffers some evidence of such manifestation, regardless of its reliability or credibility, Madden argues that the presumption is created and the burden shifts to the agency to rebut the presumption, by a preponderance of the evidence, with contrary evidence.

Madden thus faults the Board for having itself taken the measure of the quality of Madden's evidence. In Madden's view, the Board has no authority to assess the quality of his evidence, once he has put forth some evidence to support presumptive service connection. Instead, the Board must accept the veteran's evidence at face value, and reject or discount it only on the basis of rebuttal evidence proffered by the agency.

Madden seems to recognize the weakness of his interpretation, at least insofar as lay testimony is concerned. The regulation itself speaks of "competent" lay evidence, thus contemplating the possibility that some lay evidence may be rejected. Lay evidence which is in fundamental conflict with other lay evidence and is, for that reason, found not credible in a given case, is surely suspect. Madden thus notes that, even if the lay evidence in this case cannot support his claim, the medical evidence he submitted must, as a matter of law, be deemed adequate to gain presumptive service connection.

Madden's slightly less bold and slightly more refined interpretation of section 3.307 thus homes on medical evidence, asserting that any medical evidence of presumptive service connection satisfies the regulation, thus shifting the burden of rebuttal to the agency, regardless of the strength or soundness of the proffered medical evidence.

We reject Madden's interpretation of section 3.307. In this case, the medical evidence is based on a doctor's recollection of events occurring 14 years earlier, refreshed by assertions of fact made by the veteran to the doctor in 1990. No physical findings or symptomatology elicited by examination are noted by the doctor, and even the evidence showing Madden's attendance dates in a psychiatric ward post-date the event by 14 years. Furthermore, the medical evidence is contradicted by Madden's own contemporaneous explanation of his 1976 hospital visit as prompted by his troubles with alcohol.

At bottom, Madden's reading of section 3.307 would deprive the Board of its authority to discount the weight and probity of evidence in the light of its own inherent characteristics and its relationship to other items of evidence. Any medical evidence, of whatever character or dimension, would give rise to a presumption of service connection which would be rebuttable only by a large measure of contrary medical evidence. Madden cites no precedent to support his proposed emasculation of the Board's inherent fact-finding authority, and indeed overlooks the considerable body of law imposing a duty on the Board to analyze the credibility and probative value of evidence *sua sponte*, when making its factual findings. *See Goodsell v. Brown*, 5 Vet. App. 36, 42 (1993) (Board

failed to evaluate credibility and probative value of physicians' statements); *Culver v. Derwinski*, 3 Vet. App. 292, 297-98 (1992) (Board failed in its duty to include analysis of credibility or probative value of evidence in support of claim for service connection); *Miller v. Derwinski*, 3 Vet. App. 201, 204 (1992) (Board must assess credibility and weight of lay testimony); *Wilson v. Derwinski*, 2 Vet. App. 614, 618 (1992) (when physician accepts veteran's descriptions as credible and renders diagnosis thereon, Board has duty to assess credibility and weight to be given to the evidence), *appeal dismissed*, 996 F.2d 1236 (Fed. Cir. 1993) (unpublished table decision); *Sanden v. Derwinski*, 2 Vet. App. 97, 100 (1992) (Board's task includes determining credibility of evidence). This body of law is to be expected as a surround for any judicial fact-finder, as an inherent function of the entity charged with responsibility for the determination of fact. Madden gives us no reason to abandon or limit this body of law in the circumstances of this case.

We reject Madden's interpretation of the governing law, and hold that the Board is entitled independently to assess the quality of evidence before it. We agree with the Court of Veterans Appeals that the Board in this case properly exercised its authority to assess the credibility and weight of the evidence before it, and did not clearly err when it held that Madden has failed to demonstrate entitlement to a presumptive service connection for the claimed psychiatric disability.

We have considered Madden's other arguments on appeal and find them without merit.

For the reasons set forth above, the decision of the Court of Veterans Appeals is affirmed.

No costs.

AFFIRMED

APPENDIX B

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 94-1100

MARK E. MADDEN, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HOLDAWAY, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet.App. R. 28(j), this action may not be cited as precedent.

HOLDAWAY, *Judge*: The appellant, Mark E. Madden, appeals an August 16, 1994, decision of the Board of Veterans' Appeals (BVA or Board) that (1) found that the appellant had submitted new and material evidence to reopen his claim for service connection for an acquired psychiatric disorder; and (2) denied the appellant's claim for service connection on the merits. The Court has jurisdiction over this matter under 38 U.S.C. § 7252(a). Summary disposition is appropriate when, as here, the case is one "of relative simplicity" whose outcome is controlled by precedent and "is not reasonably debatable." *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the BVA's decision.

I. Factual Background

The appellant served on active duty in the United States Army from March 1973 to March 1976. In January 1975, the appellant was treated for low back pain caused when a wall locker toppled onto him. He was treated on several other occasions for a low back condition, and for alcoholism on two separate occasions while in service. The appellant's service medical records do not show that an acquired psychiatric disorder had been diagnosed while in service.

In November 1976, the appellant filed a claim for service connection for a nervous condition. The claim was later considered withdrawn when the appellant failed to report for a physical examination. In January 1983, the appellant filed claims for service connection for a low back injury, for a nervous condition, and for liver disease secondary to alcoholism. In June 1983, the VA regional office (RO) denied the appellant's claims.

In March 1987, the appellant attempted to reopen his claims. In support, he submitted copies of military personnel records and VA hospital discharge summaries covering the period from June to August 1987. The pertinent diagnoses were bipolar disorder, multiple substance abuse, borderline personality disorder, and chronic back pain. The appellant at that time told a VA physician that his first psychiatric hospitalization was in 1986 at the Topeka, Kansas VA Medical Center. In September 1987, the RO denied the appellant's claims for service connection.

In 1989, the Social Security Administration (SSA) found the appellant was entitled to SSA benefits as of

September 25, 1985, as a result of his psychiatric and chronic low back conditions. In January 1990, the appellant testified at a personal hearing that both his psychiatric disorder and alcoholism developed incident to his low back condition. The appellant also testified that in 1976 he had been hospitalized at Fort Lyons VA Medical Center with symptoms of anxiety, depression, suicidal ideation, and alcoholism. In a February 1990 rating decision the RO denied the appellant's claim for service connection for a nervous disorder. The appellant filed a timely Notice of Disagreement in March 1990.

In April 1990, another personal hearing was conducted at which time the appellant submitted certification from the Fort Lyons VA Medical Center that he had been hospitalized on a psychiatric unit from October to December 1976. The appellant also submitted an outpatient record which stated in pertinent part:

> This 36 year old non-service-connected male vet was at Fort Lyons 10-9-76 to 12-9-76. He was here for results of suicidal ideation with depression and anxiety and back problems and history of alcohol and drug abuse since he hurt his back in Army . . . He was as I remember a patient while on 7 Building – he was prescribed with physical therapy – punching bag and running to expend energy that was associated with agitation and anxiety related to depression . . . I cannot remember myself if Valium was prescribed as it may have been I cannot remember . . . [H]e is concerned with . . . trying to . . . prove that he was hospitalized within one year of service. I have a strong feeling he may have been my patient.

The record also includes a letter written by the appellant to the St. Paul, Minnesota RO in which he stated that he had been admitted to the Ft. Lyons Medical Center for treatment of alcohol abuse. Following a third personal hearing and submission of other medical records from August 1990 to April 1991, the BVA in November 1991 denied the appellant's claims for service connection.

The appellant appealed the November 1991 BVA decision to the Court. On April 27, 1993, the Court affirmed the BVA's decision as to his claim for chronic low back pain, and remanded his claim for service connection for a psychiatric disorder. In January 1994, the BVA remanded the case to the RO in order to obtain medical records from the Fort Lyons VA Medical Center. VA was ultimately unsuccessful in its attempt to obtain the relevant medical records. The case was recertified to the Board in July 1994.

In the decision now on appeal, the Board found that the appellant had submitted new and material evidence sufficient to reopen his claim for service connection for an acquired psychiatric disorder. The BVA then denied the claim on the basis that the appellant had not presented any credible evidence of a psychiatric disorder during service or within one year following discharge.

II. Analysis

A. New and Material

When a veteran attempts to reopen a previously denied claim, the BVA must undertake a two-step analysis. *Manio v. Derwinski*, 1 Vet.App. 140, 145 (1991). First it

must determine whether the evidence presented or secured since the prior final disallowance of the claim is "new and material." *See Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991). "New" evidence is that which is not "merely cumulative" of other evidence on the record. *Ibid.* Evidence is "material" where it is relevant to and probative of the issue at hand and where there is a reasonable possibility that, when viewed in the context of all the evidence, both new and old, it would change the outcome. *See Blackburn v. Brown*, 8 Vet.App. 97, 102 (1995); *Sklar v. Brown*, 5 Vet.App. 140, 145 (1993); *Cox v. Brown*, 5 Vet.App. 95, 98 (1993); Colvin, 1 Vet.App. at 174. Second, if the BVA determines that the evidence is "new and material," it must reopen the claim and "evaluate the merits of the veteran's claim in light of *all* the evidence, both new and old." *Masors v. Derwinski*, 2 Vet.App. 181, 185 (1992). The Secretary and this Court are required to review all of the evidence submitted by a claimant since the last disallowance of the claim in order to determine whether a claim must be reopened and readjudicated on the merits. 38 U.S.C. § 5108. The Board must assume the credibility of the evidence when considering whether it is new and material. *Justus v. Principi*, 3 Vet.App. 510, 512 (1992). Whether evidence is "new and material" is a conclusion of law which this Court reviews de novo under 38 U.S.C. § 7261(a)(1). *See Colvin*, 1 Vet.App. at 174; *Masors*, 2 Vet.App. at 185.

The additional evidence submitted by the appellant was a statement by a VA physician that the appellant was hospitalized at Fort Lyons VA Medical Center in 1976 for treatment of symptoms of anxiety, depression, suicidal ideation, and alcoholism. Assuming, as we must for the

purpose of determining whether evidence is new and material, that the new documentation is credible, it qualifies as both new and material. The statement from the VA physician is new in that it is not merely cumulative of the evidence already on record. The evidence is material because when considered with all of the evidence of record, there is a reasonable possibility it would establish that the veteran suffered a service-connected disability to a compensable degree within one year of separation. *See* 38 U.S.C. § 1112(a); 38 C.F.R. § 3.307(a)(3) (1995). The Court holds that the appellant submitted new and material evidence sufficient to reopen his claim for service connection for an acquired psychiatric disorder.

B. Presumption of Service Connection

Once a claim has been correctly reopened, the Court reviews the Board's findings of fact with respect to such reopening under the "clearly erroneous" standard of review. *Falzone v. Brown*, 8 Vet.App. 398, 404 (1995). Under this standard, if there is plausible basis in the record for the Board's findings, the Court cannot overturn them. The Board must base its decisions on "all evidence and material of record," 38 U.S.C. § 7104(a), and must provide a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record," 38 U.S.C. § 7104(d)(1). *See Douglas v. Derwinski*, 2 Vet.App. 435, 438-39 (1992) (en banc), *vacating in part on other grounds*, 2 Vet.App. 103 (1992); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1991). The Board must "account for the evidence which it finds to be persuasive or unpersuasive," and provide reasons

or bases for rejecting evidence submitted by or on behalf of the claimant. *Gilbert*, 1 Vet.App. at 57.

Service connection will be awarded to a veteran who served on active duty during a period of war for any disease or injury that was incurred in or aggravated by a veteran's active service or for certain diseases that were initially manifested to a degree of 10% or more within a specified presumption period after the date of separation from service. *See* 38 U.S.C. §§ 1110, 1112(a); 38 C.F.R. §§ 3.303(a), 3.306, 3.307 (1995). Furthermore, a service-connection claim must be accompanied by evidence which establishes that the claimant currently has the claimed disability. *See Brammer v. Derwinski*, 3 Vet.App. 223, 225 (1992) (absent "proof of a present disability there can be no valid claim"). Pursuant to 38 C.F.R. § 3.307:

> (a) *General.* A chronic, tropical, prisoner of war related disease, or a disease associated with exposure to certain herbicide agents listed in § 3.309 will be considered to have been incurred in service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service . . .
>
> (3) *Chronis disease.* The disease must have become manifest to a degree of 10 percent or more within 1 year . . . from the date of separation from service . . .
>
> (b) *Evidentiary basis.* The factual basis may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomathology elicited by examination within the applicable period. Lay evidence should describe

the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion.

(c) *Prohibition of certain presumptions.* No presumptions may be invoked on the basis of advancement of the disease when first definitely diagnosed for the purpose of showing its existence to a degree of 10 percent within the applicable period. This will not be interpreted as requiring that the disease be diagnosed in the presumptive period, but only that there be then shown by acceptable medical or lay evidence characteristic manifestations of the disease to the required degree, followed without unreasonable time lapse by definite diagnosis. Symptomatology shown in the prescribed period may have no particular significance when first observed, but in light of subsequent developments it may gain considerable significance. Cases in which a chronic condition is shown to exist within a short time following the applicable presumptive period, but without evidence of manifestations within the period, should be developed to determine whether there was symptomatology which in retrospect may be identified and evaluated as manifestation of the chronic disease to the required 10-percent degree.

Thus, in order for service connection to be presumed, the appellant must first demonstrate that the injury or disease became manifest to a compensable degree within the one year presumptive period. The appellant is free to offer medical testimony of the relevant symptomatology or competent lay testimony. The appellant argues that the Fort Lyons physician's statement to the effect that he had

a "strong feeling" that he treated the appellant in 1976 for a psychiatric disorder establishes that the appellant developed manifestations of an acquired psychiatric disorder during the presumptive period. In the alternative, the appellant contends that even if these records merely show that the appellant was treated for a mental illness in 1976, 38 C.F.R. § 3.307(c) would require VA to determine whether there was symptomatology which in retrospect may be identified as a manifestation of the chronic disease. The Secretary responds that the appellant had stated in a letter written in 1976 that he was being treated for alcohol abuse at the Fort Lyons facility. Furthermore, the Secretary contends that the BVA was not clearly erroneous in finding that the lay and medical testimony of record did not establish that the appellant suffered an acquired psychiatric disorder during the one year presumptive period.

The determination of credibility is a finding of fact function reserved for the BVA. *Smith v. Derwinski*, 1 Vet.App. 235, 237-38 (1991). In its decision, the BVA found that the appellant's lay testimony as to the symptomatology of the acquired psychiatric disorder was not credible in light of his previous statement that he had been admitted to the Fort Lyons facility for treatment of an alcohol abuse problem. The medical evidence was similarly found to be not credible in that the testimony was vague with respect to the symptomatology observed during the course of treatment, and indeed ambiguous as to whether the physician recalls treating the appellant for a psychiatric disorder. The Board's finding that the appellant has failed to show that he suffered the claimed disorder to a compensable degree within the presumptive

period has a plausible basis in the record. The Board has furthermore considered all of the evidence, both old and new, and has provided an adequate reasons and bases for its decision. Lastly, the BVA correctly dismissed the appellant's alternative argument concerning the applicability of 38 C.F.R. § 3.307(c) because absent symptomatology within the one year presumptive period, the section is not applicable. *Harvey v. Principi*, 3 Vet.App. 343, 345 (1992). A psychiatric illness was not identified within a short time of the presumptive period as required by section 3.307(c). The earliest indication of a psychiatric condition was 1982, more than five years after the presumptive period had lapsed. *See, e.g., Soyini v. Derwinski*, 1 Vet.App. 540 (1991).

III. Conclusion

After a thorough and complete review of the record and briefs, the Court holds that the BVA has not committed either factual or legal error which would warrant reversal or remand. Accordingly, the BVA's decision is AFFIRMED.

DATED: JUN 17 1996

Copies to:

Kenneth M. Carpenter, Esq.
1525 SW Topeka Boulevard
P.O. Box 2099
Topeka, Kansas 66601

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

APPENDIX C

This is to certify that this documents is a true and correct copy of the board's decision relating to the above appellant's appeal.

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20420

IN THE APPEAL OF MARK E. MADDEN — SS 510 62 5079

DOCKET NO. 91-19 528) DATE AUG 16 1994
)
)

On appeal from the decision of the Department of Veterans Affairs Regional Office in Wichita, Kansas

THE ISSUE

Entitlement to service connection for an acquired psychiatric disorder.

REPRESENTATION

Appellant represented by: Kenneth M. Carpenter, Attorney at Law

WITNESS AT HEARINGS ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Barry F. Bohan, Counsel

INTRODUCTION

The appellant served on active duty in the United States Army from March 1973 to March 1976.

In January 1983, the appellant filed a claim of service connection for an acquired psychiatric disorder and a low back disorder. His claim was denied by the Wichita, Kansas VARO on June 2, 1983. The appellant was notified of that decision by letter from VARO dated June 10, 1983; he did not file a notice of disagreement.

In March 1987, the appellant requested that his claim be reopened as to the issue of service connection for a chronic low back disorder. The claim was denied in a September 1987 VARO decision. The appellant filed a notice of disagreement in January 1988, and VARO issued a statement of the case in March 1988. The appellant did to file a formal appeal to the Board.

In May 1989, the appellant again requested that his claim for service connection for a low back disorder be reopened. The VARO confirmed and continued the previous denials of service connection for a low back disorder in July 1989. In August 1989, the appellant again filed a claim for service connection for an acquired psychiatric disorder. The claim was denied in a February 1990 VARO rating decision The appellant duly appealed those decisions to the Board.

In a decision in November 1991, the Board denied the appellant's claim, finding that the June 1983 VARO decision was final and that the appellant had not submitted new and material evidence sufficient to reopen the claim.

The appellant duly appealed the Board's decision to the United States Court of veterans Appeals (the Court).

On April 27, 1993, the Court affirmed the Board's decision as to the appellant's claim of service connection for a chronic low back disorder and vacated and remanded the Board's decision as to the appellant's claim of service connection for an acquired psychiatric disorder. Specifically, the Board was to further develop the evidence with respect to a claimed psychiatric hospitalization of the appellant at the Fort Lyon, Colorado VAMC shortly after he left military service in 1976. *Madden v. Brown*, U.S. Vet. App. No. 92-292 (April 27, 1993).

On January 11, 1994, the Board remanded this case so that all records pertaining to the appellant's hospitalization from October to December 1976 could be obtained and associated with his claims folder. On January 20, 1994, the appellant's attorney contacted VARO, indicating that previous efforts to obtain the records had been unsuccessful and that no records pertaining to the appellant's hospitalization in 1976 presently existed. In February 1994, the VA medical facility confirmed that no such records were available. The appellant's claims folder was returned to the Board, where it was received in July 1994.

CONTENTIONS

The appellant contends, in substance, that evidence which has been added to the record since the June 1983 VARO decision is new and material and serves to reopen his claim for service connection for an acquired psychiatric disorder. He further contends that he was hospitalized for depression and anxiety within one year after

service and that service connection should therefore be granted for an acquired psychiatric disorder on a presumptive basis.

DECISION OF THE BOARD

The board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the appellant has submitted new and material evidence which is sufficient to allow a reopening of his claim of service connection for an acquired psychiatric disorder. Based on a review of all of the evidence, entitlement to service connection for an acquired psychiatric disorder is denied.

FINDINGS OF FACT

1. The appellant served on active duty in the United States Army from March 1973 to March 1976.

2. In a June 2, 1983 decision, VARO denied the appellant's claim of service connection for an acquired psychiatric disorder; the appellant was informed of that decision by letter from VARO dated June 10, 1983, and he did not appeal therefrom.

3. Evidence submitted by the appellant since the June 1983 decision is new and material and serves to reopen the appellant's claim of service connection for an acquired psychiatric disorder.

4. An acquired psychiatric disorder was not evident during service or until 1982, a number of years after service.

CONCLUSIONS OF LAW

1. The June 1983 VARO decision which denied service connection for an acquired psychiatric disorder is final, but evidence submitted since that decision is new and material and the appellant's claim is reopened. 38 U.S.C.A. §§ 5108, 7105 (West 1991); 38 C.F.R. §§ 3.104(a), 3.156(a), 20.302, 20.1103 (1993).

2. an acquired psychiatric disorder was not incurred in or aggravated by military service, and may not be so presumed. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1131, 1137 (West 1991); 38 C.F.R. §§ 3.307, 3.309 (1993).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The appellant is seeking service connection for an acquired psychiatric disorder. Under pertinent law and VA regulations, service connection may be granted if symptomatology attributable to an acquired psychiatric disorder appeared during service or became evident to a compensable degree within one year thereafter, in this case by March 15, 1977. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1131, 1137 (West 1991); 38 C.F.R. §§ 3.307, 3.309 (1993).

As was indicated above, the appellant's claim for service connection for an acquired psychiatric disorder was denied in a June 1983 VARO rating decision. He was duly

notified of that decision by letter, but he did not file a substantive appeal within one year thereafter. Thus, the decision of the VARO is considered to be final. 38 U.S.C.A. § 7105 (West 1991); 38 C.F.R. §§ 3.104(a), 20.302, 20.1103 (1993).

Under pertinent law and regulations, as interpreted by the United States Court of Veterans Appeals, the Board may reopen and review a claim which has been previously denied if new and material evidence is submitted by or on behalf of the appellant. 38 U.S.C.A. § 5108 (West 1991); 38 C.F.R. § 3.156(a) (1993); and *Manio v. Derwinski*, 1 Vet.App. 140 (1991).

"New" evidence means evidence which is not merely cumulative or redundant. *Colvin v. Derwinski*, 1 Vet.App. 171 (1991). "Material" evidence is evidence which is relevant and probative of the issue at hand and which, furthermore, leads to a reasonable possibility that the new evidence, when viewed in the context of all of the evidence of record, would change the outcome of the case. *Smith v. Derwinski*, 1 Vet.App. 178 (1991).

The "old" evidence

Evidence which was considered by the VARO in June 1983 consisted of the appellant's service medical records, which were replete with references to excessive alcohol use, but did not refer to clinical findings of a psychiatric disorder. Included in the evidence then of record was a November 1976 letter to the VARO in St. Paul, Minnesota, on an unrelated matter, in which the appellant stated: "On the 9th day of October I was admitted to the Ft. Lyons [sic] Veterans Hospital for alcohol abuse. I feel that

under this circumstance I should not be required to pay said debt."

The VARO decision

The June 1983 VARO decision denied the appellant's claim of service connection for an acquired psychiatric disorder based on the absence of any psychiatric symptomatology in the record. That decision noted that the service medical records indicated that the appellant had been treated for problems associated with his alcoholism, but that no primary psychological or psychiatric illness or disease was evident in service.

The additional evidence

Evidence which has been added to the record includes numerous medical and hospital records dating from 1982. In addition, the appellant has submitted lengthy revised medical chronologies, containing excerpts or abstractions of medical records of record, and other briefs and documents, all of which were prepared by his attorney.

It appears from the record that the appellant has participated in alcohol treatment programs since shortly after his discharge from military service. No contemporaneous reference to a psychiatric disorder, however, appears of record until a report of the appellant's hospitalization at a private facility, beginning in February 1982. Diagnoses at that time were dysthymic disorder (a neurosis), alcohol abuse (in remission) and a personality disorder. Subsequent diagnoses, appearing years later, included bipolar

disorder (a psychosis), alcohol abuse and a personality disorder.

During a period of VA hospitalization in August 1987, the appellant stated that his first psychiatric admission was at the Topeka, Kansas VAMC in 1986, at which time he was depressed. During another period of VA hospitalization in October and November 1987, he gave a medical history of participating in treatment programs at the Fort Lyon, Colorado VAMC in 1976; he did not mention being hospitalized at that time for any psychiatric problem. However, starting in January 1990, in connection with his claim for service connection for an acquired psychiatric disorder, the appellant began to tell VA personnel that he had been hospitalized at Fort Lyon in 1976 because of psychiatric symptomatology (January 1990 hearing transcript, page 23).

According to a VA outpatient report dated in April 1990, the appellant told a VA physician that he had been hospitalized at the Fort Lyon, Colorado VAMC from October to December 1976 due to suicidal ideation with depression and anxiety. The appellant also stated that the physician had treated him during that 1976 hospitalization. The physician stated that the appellant was "concerned with trying to date his hosp[italization] to prove he was hosp[italized] within one year of service. I have a strong feeling he may have been my patient." The physician also wrote: "I cannot remember myself if valium was prescribed as it may have been I cannot remember." Also of record is a certification of visit, signed by a VA official on April 23, 1990, to the effect that the appellant was on a psychiatric unit at Fort Lyon, Colorado VAMC from October 9 to December 9, 1976.

As noted in the Introduction portion of this decision, pursuant to the Court's remand, the Board attempted to assist the appellant by securing directly from the Fort Lyon, Colorado VAMC the records of hospitalization covering the period from October to December 1976, but this effort was to no avail.

Analysis

After having considered the additional evidence, the Board is of the opinion that it is both new and material. The medical reports starting in 1982, unlike the service medical records which were before the VARO in June 1983, document that the appellant has an acquired psychiatric disorder. In addition, we have the April 1990 VA outpatient treatment record, which refers to the 1976 hospitalization of the appellant as a psychiatric hospitalization. At this juncture, we must accept that report and the accompanying certification of visit at face value for the purposes of determining whether it enables us to reopen the claim. *Justus v. Principi*, 3 Vet.App. 510, 512-3 (1992).

Having decided that the claim is reopened, the next question is whether the board can conduct a *de novo* review at this time. *See Bernard v. Brown*, 4 Vet.App. 384 (1993). We conclude that we may proceed without prejudice to the appellant since the VARO previously provided the appellant and his representative with notice of the requirements for establishing service connection, the primary argument during the course of the instant appeal has been on the merits of the case, and he has had the opportunity for a full hearing to present evidence and

argument throughout the process. Concerning the latter, we note that the appellant presented testimony and evidence in connection with this appeal in hearings conducted at the VARO in 1990 and 1991, following his filing of an application to reopen his claim.

The Board has carefully reviewed the evidence in this case, described above, on a *de novo* basis. It is evident that the resolution of this claim hinges on the appellant's hospitalization in the fall of 1976, shortly after he left military service. If, as the appellant now contends, he was hospitalized at that time due to compensable anxiety, and depression, manifested by a suicide attempt, that would be strong evidence that service connection should be granted for an acquired psychiatric disorder. If, on the other hand, the appellant was hospitalized at that time merely for alcohol abuse treatment, and no psychiatric disorder was identified during the hospitalization, there is no basis for service connection, since there is no evidence of record of treatment for psychiatric manifestations during military service or for several years after service.

There are apparently no records available concerning the 1976 hospitalization at Fort Lyon VAMC. The appellant has repeatedly stated, starting in 1990, that he was hospitalized at Fort Lyon in 1976 due to psychiatric symptomatology. Interestingly, prior to 1990, he had referred to the 1976 Fort Lyon hospitalization only in terms of alcohol rehabilitation and had dated the onset of his psychiatric problems several years later. The Board believes that the appellant's letter to the VARO in St. Paul, Minnesota, on another matter, apparently written while he was hospitalized in November 1976, is highly probative and of

great significance. The appellant stated specifically that the basis for that hospitalization was "alcohol abuse" treatment.

Now associated with the record is the April 1990 statement of a VA physician, which referred to the 1976 hospitalization. The appellant has been quite forthright in stating that he sought out the physician in order to verify his contention (April 1991 hearing transcript, page 6). As is evident from the quotations cited above, the physician did not remember much, if anything, about the appellant's hospitalization fourteen years earlier. In fact, the physician was not even sure whether the appellant had been his patient. It is therefore very obvious that the favorable details of the reported psychiatric symptomatology referred to by the physician many years after the fact were supplied by the appellant. In the opinion of the Board, the April 1990 report is rather qualified in nature, at best, only marginally less equivocal than the "may or may not" language in *Tirpak v. Derwinski*, 2 Vet.App 609, 611 (1992), and no better than the information furnished by the appellant in *Swann v. Brown*, 5 Vet.App. 229, 233 (1993). Such evidence does little more than suggest a possibility that the appellant was treated for a psychiatric illness during the year following his discharge from service.

It is possible that the VA physician did indeed treat the appellant in 1976; however, the record does not reflect the nature and severity of any psychiatric illness treated while he was on a VA psychiatric unit in late 1976. Rather the available evidence provided by the appellant contemporaneous with the event reveals only that he was in the process of detoxification for alcohol abuse during that

1976 period of hospitalization. The appellant's verifiable medical history demonstrates only alcohol abuse during service, and no indication of any identifiable psychiatric disorder until 1982, approximately six years after service. The appellant himself evidently related such a history until relatively recently, when he requested a reopening of his claim for VA benefits for a psychiatric disorder. For the presumption of service connection to operate, it must be evident that a psychosis (as opposed to a neurosis) was manifest to a compensable degree within the one-year period after service separation. Despite the appellant's assertions to the contrary, the new and material evidence together with that previously of record does not show the presence of an acquired psychiatric disorder in service nor a psychosis to a compensable degree within the year immediately following his service separation.

Based on the totality of the evidence, therefore, it is the decision of the Board that service connection for an acquired psychiatric disorder should be denied, based on the lack of evidence of an identifiable acquired psychiatric disorder until a number of years after the appellant's discharge from active military service.

ORDER

Service connection for an acquired psychiatric disorder is denied.

/s/ Kenneth R. Andrews, Jr.
KENNETH R. ANDREWS, JR.
(Substituting For A Member
Since Retired)

/s/ B. Kannee
B. KANNEE

/s/ J.F. Gough
J.F. GOUGH

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991), decision of the Board of Veterans' Appeals granting less than the complete benefit or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 1, 1988. Veterans' Judicial Review Act, Pub. L. No. 110-687, § 402 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the board of Veterans' Appeals.

Supreme Court, U.S.
FILED
FEB 27 1998
CLERK

No. 97-1064

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARK E. MADDEN, PETITIONER

v.

TOGO D. WEST, JR., ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
SHARON Y. EUBANKS
JOHN J. HOFFMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTION PRESENTED

Whether any evidence submitted by a veteran showing manifestation of disability within one year after service is necessarily sufficient to establish the presumption of service connection under 38 C.F.R. 3.307(b).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Ascherl v. *Brown*, 4 Vet. App. 371 (1993)	9
Cartright v. *Derwinski*, 2 Vet. App. 24 (1991)	9
Cuevas v. *Principi*, 3 Vet. App. 542 (1992)	9
Del Veccio v. *Bowers*, 296 U.S. 280 (1935)	11
Gilbert v. *Derwinski*, 1 Vet. App. 49 (1991)	8, 9
Grant v. *Shalala*, 989 F.2d 1332 (3d Cir. 1993)	13
Grottveit v. *Brown*, 5 Vet. App. 91 (1993)	10
Inwood Labs., Inc. v. *Ives Labs., Inc.*, 456 U.S. 844 (1982)	7
Jensen v. *Brown*, 19 F.3d 1413 (Fed. Cir. 1994)	10
Kerner v. *Flemming*, 283 F.2d 916 (2d Cir. 1960)	11
Layno v. *Brown*, 6 Vet. App. 465 (1994)	9
Meehan Seaway Serv. Co. v. *Director, OWCP*, 125 F.3d 1163 (8th Cir. 1997), petition for cert. pending, No. 97-1032	12
Pietrunti v. *Director, OWCP*, 119 F.3d 1035 (2d Cir. 1997)	12
Schaal v. *Apfel*, Nos. 96-6212 & 96-6316, 1998 WL 21886 (2d Cir. Jan. 23, 1998)	12
Underwood v. *Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997)	12
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	12

Statutes, regulations and rule: Page

38 U.S.C. 101(16) 2
38 U.S.C. 1101 2
38 U.S.C. 1110 2
38 U.S.C. 1112(a) 2
38 U.S.C. 1131 2
38 U.S.C. 1137 2
38 U.S.C. 1153 10
38 U.S.C. 1154 10
38 U.S.C. 1154(b) 10
38 U.S.C. 5107(b) 8, 9
38 U.S.C. 5108 3
38 U.S.C. 7104(a) 3
38 U.S.C. 7104(b) 3
38 U.S.C. 7251 3
38 U.S.C. 7252 3
38 U.S.C. 7261(a)(4) 7
38 U.S.C. 7292(a) 5
38 U.S.C. 7292(d)(2) 5
38 C.F.R.
Section 3.303(a) 2
Section 3.307(b) 2, 5, 6, 10
Section 20.1103 3
Section 20.1105 3
Fed. R. Civ. P. 52(a) 7

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1064

MARK E. MADDEN, PETITIONER

v.

TOGO D. WEST, JR., ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 125 F.3d 1477.[1] The opinion of the Court of Veterans Appeals (Pet. App. 12-21) is unreported. The opinion of the Board of Veterans' Appeals (Pet. App. 22-34) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1997. The petition for a writ of certiorari was filed on December 29, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The case caption has been changed to reflect that Togo D. West, Jr., is now Acting Secretary of Veterans Affairs.

STATEMENT

1. A veteran who has a disability "resulting from personal injury suffered or disease contracted in line of duty" is entitled to federal disability benefits. 38 U.S.C. 1110, 1131. A disability is "service-connected" if it "was incurred or aggravated * * * in line of duty in the active military, naval, or air service." 38 U.S.C. 101(16). A veteran may demonstrate his disability's service connection either "by affirmatively showing inception or aggravation during service or through the application of statutory presumptions." 38 C.F.R. 3.303(a). One of those statutory presumptions provides that, for certain chronic conditions, including psychoses, if the condition becomes manifest to a degree of ten percent or more within one year from the date of separation from service, the condition is presumed to have been incurred in service. 38 U.S.C. 1101, 1112(a), 1137. A veteran may establish that a disease manifested itself within the required time period by "medical evidence, competent lay evidence or both." 38 C.F.R. 3.307(b).

2. a. Petitioner served on active military duty in the Army from March 1973 to March 1976. Pet. App. 13, 23. In June 1983, a Veterans Administration (now Department of Veterans Affairs) (VA) regional office denied petitioner's claim for service connection for a lower back injury, liver disease secondary to alcoholism, and a nervous condition. *Id.* at 13.

Petitioner attempted to reopen the claim in March 1987. Pet. App. 13, 23. In September 1987, the VA regional office again denied the claim. *Ibid.* After petitioner testified at a personal hearing, the regional office denied the claim again in February 1990. *Id.* at 14. Petitioner appealed to the Board of Veterans'

Appeals (Board),[2] which denied the appeal in November 1991. *Id.* at 15, 23. Petitioner then appealed to the Court of Veterans Appeals,[3] which remanded the claim to the Board. *Id.* at 15, 24. In January 1994, the Board remanded the case to the regional office to obtain medical records. *Ibid.*

b. In an August 16, 1994 decision, the Board found that petitioner had submitted new and material evidence meriting reopening of the claim[4] but denied the claim because petitioner had not presented credible evidence of a psychiatric disorder during service or within one year following his discharge. See Pet. App. 30, 33. Petitioner presented three new pieces of evidence: "his own lay testimony that his psychiatric condition stemmed from a back injury incurred during service, the pain from which accounted for his alcohol and drug abuse, which fueled his psychiatric difficulties," (*id.* at 2), and two documents written by a physician on April 23, 1990, nearly 14 years after his alleged hospitalization for a psychiatric disorder. The first of those documents was a set of notes taken by the physician summarizing a conversation with petitioner in which the physician stated that he had "a strong feeling [that petitioner]

---

[2] The Board is the division within the VA responsible for deciding appeals from decisions on claims for veterans benefits. 38 U.S.C. 7104(a).

[3] Established in 1988, the Court of Veterans Appeals has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. 38 U.S.C. 7251, 7252.

[4] Following a final decision by the Board or where a regional office decision becomes final in the absence of a timely appeal, a claim may be reopened only upon submission of new and material evidence. See 38 U.S.C. 5108, 7104(b); 38 C.F.R. 20.1103, 20.1105.

may have been [his] patient" at the Fort Lyon VA hospital from October 9, 1976 to December 9, 1976. *Id.* at 3. The second document was a note dated the same day stating that petitioner "[w]as on a Psychiatric Unit for the following hospitalization" from "10/9/76 to 12/9/76." *Ibid.* "[T]he resolution of [petitioner's] claim," the Board explained, "hinges on [his] hospitalization in the fall of 1976, shortly after he left military service." *Id.* at 31. After reviewing all the evidence, new and old, the Board concluded:

> [T]he record does not reflect the nature and severity of any psychiatric illness treated while [petitioner] was on a VA psychiatric unit in late 1976. Rather the available evidence provided by [petitioner] contemporaneous with the event reveals only that he was in the process of detoxification for alcohol abuse during that 1976 period of hospitalization. [Petitioner's] verifiable medical history demonstrates only alcohol abuse during service, and no indication of any identifiable psychiatric disorder until 1982, approximately six years after service.

Id. at 32-33.

c. The Court of Veterans Appeals (CVA) affirmed the Board's decision. Relying on the principle that "determination of credibility is a finding of fact function reserved for the [Board,]" the CVA found the Board's findings possessed "a plausible basis in the record." Pet. App. 20-21. On August 12, 1996, the CVA denied a motion for panel review.

d. The Court of Appeals for the Federal Circuit affirmed the CVA's decision. Interpreting petitioner's appeal liberally, the Federal Circuit viewed the appeal as challenging the Board's and the

CVA's interpretation of 38 C.F.R. 3.307(b).[5] That regulation, which establishes the evidentiary standards for claims of service connection, provides in pertinent part:

> *Evidentiary basis.* The factual basis may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomatology elicited by examination within the applicable period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion * * *.

The Federal Circuit understood petitioner to be offering either of two possible readings of Section 3.307(b): that "*any* evidence submitted by the veteran showing manifestation of the claimed disability within the prescribed time is sufficient to gain the presumption of service connection" (Pet. App. 8), or that any *medical* evidence submitted by the veteran is sufficient to gain the presumption, *id.* at 9. The Federal Circuit found both of petitioner's interpretations insupportable because both would "deprive the Board of its authority to discount the weight and prob[a]t[ive value] of evidence in light of its own inherent characteristics and its relationship to other items of evidence." *Ibid.* The court concluded:

> [T]he Board in this case properly exercised its authority to assess the credibility and weight of the evidence before it, and did not clearly err when

---

[5] The Federal Circuit's jurisdiction to review decisions of the CVA is limited to legal questions. 38 U.S.C. 7292(a) and (d)(2); see also Pet. App. 6-7.

> it held that [petitioner] has failed to demonstrate entitlement to a presumptive service connection for the claimed psychiatric disability.

Id. at 10.

ARGUMENT

The court of appeals' decision affirming the denial of service connection for a psychiatric disorder is correct and presents no issue warranting review by this Court.

1. The court of appeals correctly held that 38 C.F.R. 3.307(b) does not divest the Board of Veterans' Appeals of its "authority to discount the weight and prob[a]t[ive value] of evidence in the light of its own inherent characteristics and its relationship to other items of evidence." Pet. App. 9. Rather, the Board "is entitled independently to assess the quality of evidence before it." *Id.* at 10. That holding is consistent with the plain language of Section 3.307(b), which itself identifies some bases for the Board to reject evidence offered by claimants. Thus, Section 3.307(b) requires that medical evidence "should set forth the physical findings and symptomatology elicited by examination within the applicable period" and that lay evidence "should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion." 38 C.F.R. 3.307(b).

As the court of appeals pointed out, its ruling is also consistent with the traditional conception of the "inherent function[s] of the entity charged with responsibility for the determination of fact." Pet. App. 10. Congress's intent to entrust the Board with those traditional fact-finding functions is reflected in its decision to adopt the clearly erroneous standard of

review for CVA review of the Board's factual determinations. See 38 U.S.C. 7261(a)(4); cf., *e.g.*, *Inwood Labs., Inc.* v. *Ives Labs., Inc.*, 456 U.S. 844, 855 (1982) (noting that clearly erroneous standard of Fed. R. Civ. P. 52(a) "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence").

Under petitioner's view, the Board would be required to accept any evidence submitted by a claimant as sufficient to establish the presumption of service connection, no matter how incredible that evidence was. The facts of this case illustrate the irrational results petitioner's view would produce. As the Board, the CVA, and the court of appeals all noted, petitioner's claim 14 years after the fact that he was treated for a psychiatric disorder in late 1976 was contradicted by two of his own earlier statements in the record, one from 1976 attributing his treatment to alcoholism, and one from 1987 stating that his first hospital admission for depression occurred in 1986. Pet. App. 9, 20, 27, 29, 31-32. All the reviewing bodies also noted that the 1990 statements by a physician were extremely vague and that all the particular facts in the statements appeared to be supplied by petitioner. *Id* at 9, 20, 32. Yet petitioner insists that the Board was required to disregard those considerations weakening the credibility of his evidence.

Moreover, as the court of appeals noted, petitioner's "proposed emasculation of the Board's inherent fact-finding authority" has no support in precedent, and indeed conflicts with

> the considerable body of law imposing a duty on the Board to analyze the credibility and probative

> value of evidence *sua sponte*, when making its factual findings. *See Goodsell v. Brown*, 5 Vet. App. 36, 42 (1993) (Board [improperly] failed to evaluate credibility and probative value of physicians' statements); *Culver v. Derwinski*, 3 Vet. App. 292, 297-98 (1992) (Board failed in its duty to include analysis of credibility or probative value of evidence in support of claim for service connection); *Miller v. Derwinski*, 3 Vet. App. 201, 204 (1992) (Board must assess credibility and weight of lay testimony).

Pet. App. 9-10.

Petitioner argues (Pet. 11) that the court of appeals' ruling conflicts with the "benefit of the doubt" standard embodied in 38 U.S.C. 5107(b). That standard provides:

> When, after consideration of all evidence and material of record in a case * * *, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden [of proof.]

Petitioner misconceives the role of the "benefit of the doubt" provision. That provision simply establishes the standard of proof claimants must meet, a standard slightly less demanding than the "preponderance of the evidence" standard, for claimants need only establish that "the evidence is in relative equipoise." *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 54 (1991). The "benefit of the doubt" standard "does not apply during the process of submitting or gathering

evidence. The statute provides that it becomes an issue only '*after consideration* of all evidence and material of record.'" *Id.* at 55 (emphasis added). The standard is "similar to the rule deeply embedded in sandlot baseball folklore that 'the tie goes to the runner.'" *Ibid.* Thus, the standard only applies once the umpire, that is, the Board, after considering all the evidence, that is, after assessing the credibility and weight of the materials before it, determines that there is a tie that needs to be broken. The standard says nothing about the methods the Board should use in determining whether a tie in fact exists, that is, whether the "positive and negative evidence" is in "approximate balance." 38 U.S.C. 5107(b).

Petitioner also cites a number of decisions by the CVA and one decision by the Federal Circuit which he claims support his view of the reasonable doubt standard. See Pet. 11-12. In fact, not one of those decisions supports petitioner's contention. None of them directly addresses the issue presented here, namely, whether the Board has the authority to resolve questions of evidentiary credibility and weight. See *Layno* v. *Brown*, 6 Vet. App. 465, 469-471 (1994) (lay testimony competent only when it concerns the features or symptoms of an illness); *Ascherl* v. *Brown*, 4 Vet. App. 371, 378 (1993) (Board failed to fulfill its statutory duty to assist claimant in developing facts pertinent to his or her claim). Those that discuss that issue in the course of resolving other questions adopt the same position as the Federal Circuit. See *Cuevas* v. *Principi*, 3 Vet. App. 542, 547 (1992) (faulting Board for failing to "address the credibility of appellant's sworn testimony or provide reasons for discounting that testimony"); *Cartright* v. *Derwinski*, 2 Vet. App. 24, 26 (1991)

("The Board should have weighed and considered appellant's testimonial evidence and decided whether his testimony was credible."). Petitioner also mischaracterizes the court of appeals' decision in *Jensen* v. *Brown*, 19 F.3d 1413 (Fed. Cir. 1994). See Pet. 12. That case concerned statutory provisions, 38 U.S.C. 1153 and 1154, that are not at issue in this case.[6] Nor did *Jensen* address the issue of the Board's role in assessing the credibility and weight of evidence.[7]

2. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Pointing to benefit programs for longshore and harbor workers, miners, and Social Security claimants, petitioner suggests that the Federal Circuit's interpretation of 38 C.F.R. 3.307(b) violates a widely applicable principle that, "when there is unrebutted evidence offered by a claimant, that evidence cannot be discounted unless there is affirmative

---

[6] Section 1154(b) requires the Board to accept from combat veterans "satisfactory lay or other evidence" as sufficient to establish service connection even in the absence of contemporaneous official records supporting the claim. Even if that Section were applicable in this case, the Board would still have had to determine whether the proffered evidence was "satisfactory."

[7] Petitioner's characterization of his testimony is also misleading. He says he "was not testifying as to medical diagnosis or causation," but instead, was "testifying to the fact of his having received medical treatment." Pet. 12. That petitioner received medical treatment is not in dispute. The pertinent question is *why* petitioner received treatment shortly after service. Petitioner asserts that he was treated for a compensable psychiatric disorder. That is a matter of diagnosis, and lay persons are not competent to testify as to medical diagnoses or causation. See, *e.g.*, *Grottveit* v. *Brown*, 5 Vet. App. 91, 93 (1993).

evidence to the contrary." Pet. 9. Petitioner's contention is mistaken.

First, by referring to "unrebutted evidence," petitioner states the principle he attributes to other administrative agencies in a way that avoids confronting the issues at stake in this case. The question here is the authority of the Board to weigh evidence based on its lack of credibility, an issue addressed neither in the cases cited by petitioner nor in the general principle asserted by him. Also, while the Board discounted some of petitioner's evidence based on its internal characteristics, it also found some of that evidence—notably petitioner's own 1990 testimony—less credible because of its inconsistency with other record evidence. While that other record evidence does not directly "rebut" petitioner's testimony, it casts doubt on it in a way that petitioner's proposed general principle does not recognize.

Second, the decisions petitioner cites do not establish the general principle he claims possesses wide acceptance. Rather, they address a variety of particular statutory provisions establishing evidentiary presumptions of quite diverse types. In *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935), for example, this Court interpreted the presumption in the Longshoremen's and Harbor Workers' Compensation Act that, absent substantial evidence to the contrary, a death should be judged accidental rather than suicidal. The Court held that the presumption comes into play only "where there is an entire lack of competent evidence" supporting a determination of suicide. *Id.* at 286. In *Kerner* v. *Flemming*, 283 F.2d 916, 920-921 (2d Cir. 1960), the court simply remanded a denial of a disability claim, insisting that the Social Security Administration bore an obligation to assist the

claimant in collecting sufficient evidence to make the determinations concerning employability required by the statute. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court upheld the constitutionality of a provision in the Federal Coal Mine Health and Safety Act stating that "no claim for benefits . . . shall be denied solely on the basis of the results of a chest roentgenogram [X-ray]." *Id.* at 31. None of those holdings supports the general principle urged by petitioner, let alone its applicability to a program—veterans benefits—not addressed in any of those decisions.

Third, under each of the benefit programs discussed by petitioner, courts have found, as the Federal Circuit found here concerning veterans' disability benefits, that the administrative finder of fact—typically an administrative law judge in the first instance—has both the authority and responsibility to determine whether claimants' evidence is credible and to determine the weight to be given particular items of evidence in light of other evidence. See, *e.g.*, *Schaal* v. *Apfel*, Nos. 96-6212 & 96-6316, 1998 WL 21886, at *4-6 (2d Cir. Jan. 23, 1998) (ALJ may assess credibility of Social Security claimant's testimony in light of her demeanor and work history); *Meehan Seaway Serv. Co.* v. *Director, OWCP*, 125 F.3d 1163, 1168-1169 (8th Cir. 1997) (ALJ's credibility determinations and considerations as to weight of evidence are not for court review in longshore cases), petition for cert. pending, No. 97-1032; *Pietrunti* v. *Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997) (ALJ has discretion to evaluate credibility of longshore claimant and to arrive at independent judgment); *Underwood* v. *Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (ALJ considering claim for black-lung

benefits may make credibility determinations and weigh evidence presented); *Grant* v. *Shalala*, 989 F.2d 1332, 1336 (3d Cir. 1993) (Social Security ALJ required to make credibility determinations).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
SHARON Y. EUBANKS
JOHN J. HOFFMAN
Attorneys

FEBRUARY 1998